In order for this honorable court to have a complete understanding of this case I feel that it is appropriate that the court understand the proceedings that took place in the lower courts.

This case arises due to the United States District Court Eastern District of California judgment and orders dated December 16, 2003. The District Court erroneously granted defendant's motion to dismiss under Federal Rule of Civil Procedure 12 (b)(6) for failure to state a claim upon which relief could be granted. The Ninth Circuit affirmed.

In an order of December 16, 2003 the Honorable Morrison C. England adopted the magistrates judges' finding and recommendations and dismissed the entire action without granting Plaintiff's request for leave to amend his complaint. In addition, the United States District Courts' order is ambiguous in that the order does not reflect whether the action was dismissed with or without prejudice or with leave to amend.

William J. Prater, dba Prater Tree Farm had on August 26, 2003 filed a complaint for money damages against David C. Ormiston Jr. in the United States District Court alleging that Mr. Ormiston had acting in concert with others willfully violated an injunction of the Federal Court namely 11 U.S.C.§ 362 (the Automatic Stay of the Bankruptcy Court).

Mr. Ormiston with knowledge of the bankruptcy case, filed or caused to be filed two different complaints in the Butte County Superior Court State of California and during the pendency of the Bankruptcy Case without obtaining a relief from stay from the Bankruptcy Court. Mr. Ormiston had knowledge of the Bankruptcy filing because William J. Prater sent Mr. Ormiston's counsel two

different letters informing them of the bankruptcy filing and requesting that they dismiss the state court actions.

The Judgment of the Untied States District Court dated December 16, 2003 is flawed in that both Judge Mueller and Judge England determined that the Automatic Stay 11 U. S.C. § 362 no longer continued after William J. Prater, dba Prater Tree Farm's discharge from the Bankruptcy Court dated June 5, 2000.

The record in this case and applicable Law clearly demonstrates that both Judge Mueller and Judge England's decision to grant defendant's motion to dismiss for failure to state a claim was erroneous, contrary to applicable law and an abuse of discretion.

Plaintiff/Appellant William J. Prater represented himself throughout the proceedings and continues to represent himself because of inadequate funds to engage counsel.

**B. The District's Courts Judgment Dismissing Plaintiff's Case for failure to State a Claim is Clearly Erroneous, Contrary to Applicable Law, the Facts of the Case and an Abuse of Discretion.**

On August 22, 2003 this Appellant as Plaintiff filed a complaint against David C. Ormiston Jr. in the United State District Court Eastern District of California being now Case No. CIV-S-03-1770 MCE KJM-PS. for a willful violation of 11 § U.S.C. 362 (a).

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636 et seq. and local rule 72-302.

On November 6, 2003, the magistrate judge filed an order and findings and recommendations with the Court. The Court ordered that the requests for judicial notice be granted and recommended that defendant's motion to dismiss for failure to state a claim be granted and that the entire action be dismissed.

Plaintiff filed timely objections to the findings and recommendations of the Magistrate Judge (Pet. App. 10a-27a), which are self-explanatory, and are incorporated herein by reference.

On December 16, 2003 the Honorable United State District Court Morrison C. England, Jr. issued an order and judgment adopting the findings and recommendations in full, filed November 16, 2003. The Court furthered ordered that the defendant's motion to dismiss for failure to state a claim be granted and dismissed the entire action.

Plaintiff filed a timely notice of appeal from that final judgment to the United States Court of Appeals for the Ninth Circuit.

Both the United States District Court and the Ninth Circuit erred in determining that the automatic stay of the bankruptcy court terminates as to property of the bankruptcy estate when a discharge is entered in the bankruptcy case.

## II. STANDARD OF REVIEW FOR PETITIONER'S COMPLAINT

The United States Court of Appeals for the Ninth Circuit and the United States District Court both determined that plaintiff William J. Prater complaint should be dismissed for failure to state a claim upon which relief could be granted.

This decision is erroneous and squarely conflicts with both Ninth Circuit and United States Supreme Court precedent as set forth below:

**A. Rule 12 (b)(6) Standard of Review**

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law subject to *de novo* review. Stone v. Travelers Corp., 58 F.3d 434, 436-37 (9th Cir. 1995). The reviewing court considers only the contents of the complaint and construes all allegations of material fact in the light most favorable to the nonmoving party. Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996); Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed.2d 80, 78 S. Ct. 99 (1957); Parks Sch. of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). "Quoting" Gilligan v. Jamco Development Corp. 108 F.3d 246 (9th Cir. 1997) accord. Lee v. the City of Los Angeles 250 F.3d 668 (9th Cir. 2001)

In reviewing a Rule 12 (b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Pareto v. F.D.I.C. 139 F.3d 696 (9th Cir. 1998).

The test is whether the facts, as alleged, support any valid claim entitling plaintiff to relief ...not necessarily the one intended by plaintiff. Thus, a complaint should not be dismissed because plaintiff erroneously relies on the wrong legal theory if the facts alleged support any valid theory.

Haddock v. Board of Dental Examiners of Calif. (9th Cir 1985)

When a District Court dismisses a claim pursuant to a Rule 12 (b)(6) motion the Appellate Court evaluates the complaint *de novo* to decide whether it states a claim upon which relief could be granted. Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1018 (9th Cir. 1999)

Moreover, until a hearing or trial on the merits is held all pleadings and declarations are read in Plaintiff's favor. United Elec. Radio & Mach. Workers of America (UE) v. 163 Pleasant Street Corp. 987 F.2d 39, 44. (1st Cir. 1993)

**B. Notice Pleading Standard of Review**

The federal rules require only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a). The Rule 8 standard contains "a powerful presumption against rejecting pleadings for failure to state a claim." Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985); see also Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 (9th Cir. 1986)

Based on the foregoing it is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1357, at 598 (1969)

///
///
///

**C. Plaintiff's Complaint filed in the United States District Court for defendant's violation of the Automatic Stay far exceeded the requirements under Federal Rule of Civil Procedure 8(a) for stating a claim upon which relief could be granted for a violation of the Automatic Stay of the Bankruptcy Court.**

**1. Standard of Review**

Whether the automatic stay has been violated is subject to *de novo* review In re Del Mission Ltd. 98 F.3d 1147,1150 (9th Cir. 1996)

Questions of Law and of Statutory Construction are reviewed *de novo* Pareto v. F.D.I.C. 139 F.3d 696 (9th Cir. 1998).

Before pursuing and evaluating the allegations contained in Plaintiff's complaint which was dismissed for failure to state a claim it is appropriate that we look at case law and the guidelines for interpreting the statute 11 U.S.C. § 362 and then the statute itself.

Congress is presumed to know the meanings of words. The United States District Court in reaching its decision to dismiss this pro se litigant's complaint was based *inter alia* on an erroneous interpretation of a Federal Statute namely 11 U.S.C. § 362 which has a plain meaning. The United States District Court and the Ninth Circuit ignored the plain meaning of 11 U.S.C. § 362.

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator." U.S. v. Goldenberg 168

U.S. 95 (1897) See also, Ron Pair Enterprises Incorporated 489 U.S. 235, 241-242 (1989) Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992)

In enacting 11 U.S.C. § 362 (a)(3) Congress intentionally used the word any in describing the acts, which violate the Automatic Stay of the Bankruptcy Court.

United States Code Section 362 states in relevant part as follows:

> **§ 362. Automatic Stay**
>
> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay applicable to all entities, of ---
>
> (3) "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."
>
> The phrase "to exercise control over property of the estate" was added in 1984 to broaden the scope of 11 U.S.C. § 362 (a)(3) In Re Del Mission Ltd. 98 F.3d 1147 (9th Cir. 1996)
>
> Every interest of the debtor in "property of the estate" is protected by § 362 (a)(3).

**D. The Allegations Contained in Plaintiff's Complaint filed in the United States District Court did State a Claim for Relief for Defendant's Violation of the Automatic Stay.**

Plaintiff's complaint far exceeded the requirements under Federal Rule of Civil Procedure 8 for stating a claim upon which relief could be granted.

It is beyond dispute that this honorable court has ruled that pro se litigant's complaints are held to a less stringent standard than attorneys.

Contained in William J. Prater and Prater Tree Farms complaint for money damages, violation of 11 U.S.C. § 362, 11 U.S.C. § 362 (h) (Automatic Stay) filed in the United States District Court August 26, 2003 are allegations set forth below, which state a claim upon which relief can be granted, and are as follows:

> 8. Defendant David C. Ormiston Jr. acting in concert with others did willfully, intentionally with malice in violation of the Automatic Stay of the Bankruptcy Court file or caused to be filed on April 25, 2002 a complaint in Butte County Superior Court against Debtor William J. Prater.
>
> 9. Defendant David C. Ormiston Jr. acting in concert with others did willfully, intentionally with malice in violation of the Automatic Stay of the Bankruptcy Court file or caused to be filed on May 28, 2002 an amended complaint in the Butte County Superior Court against Debtor William J. Prater.
>
> 10. Plaintiff is informed and believes and thereon alleges that defendant failed to seek a relief of stay from the United States Bankruptcy Court Eastern District of

California Sacramento California, before filing a lawsuit against William J. Prater in the Butte County Superior court Oroville California.

13. The defendant did by filing the lawsuits in the Butte County Superior Court commit acts to illegally obtain possession of property of the Bankruptcy Estate in violation of the Automatic Stay of the Bankruptcy Court.

14. The defendant by filing the lawsuit in the Butte County Superior Court without obtaining relief from stay from the Bankruptcy Court did illegally commit acts to exercise control over property of the Bankruptcy Estate.

15. Defendant David C. Ormiston Jr. by filing or causing to be filed a lawsuit in the Butte County Superior Court during the pendency of the Bankruptcy Case did maliciously commit acts to obtain property from the Bankruptcy Estate while the Automatic Stay of the Bankruptcy Court was in effect in violation of the Automatic Stay of the Bankruptcy Court."

Keeping in mind the above allegations and the mandate of 11 U.S.C. § 362 there is no doubt that the above allegations, contained in Plaintiff's William J. Prater, dba Prater Tree Farm's complaint did state a claim for violations of the Automatic Stay of the Bankruptcy Court.

Moreover, a Pro Se complaint should be liberally construed and should not be dismissed unless it appears

certain that the plaintiff can prove no set of facts, which would entitle him or her to relief. Haines v. Kerner, 404 U.S. 519, 520-21, 30 L. ED2d 652, 92 S.Ct. 594 (1972). See also, Haddock v. Board of Dental Examiners of California, 777 F.2d 462 (9th Cir. 1985)

This Honorable Court should rule accordingly, and grant this petition.

**1. Plaintiff should have been allowed to amend his complaint**

The order by the District Court of December 16, 2003 is ambiguous in that it does not state whether or not the case is being dismissed, with or without prejudice or with leave to amend the complaint.

Plaintiff William J. Prater had requested several times leave to amend his complaint if the Court found his complaint insufficient which it was not.

Federal courts are particularly liberal in construing "inartful pleading" by parties appearing pro se (without counsel) Hughes v. Rowe 449 US 5,9, 101 S.Ct. 173, 176, (1980).

The Court did not grant this Pro Se litigant leave to amend his complaint, as a practical matter leave to amend is almost always granted by the court. Allen v. City of Beverly Hills 911 F.2d 367, 373 (9th Cir. 1990).

**2. The Federal Rules of Civil Procedure and the United States Supreme Court require that leave to amend should be freely given.**

"Federal Rule of Civil Procedure 15 (a) provides that a party may amend its pleadings by leave of court or by written consent of the adverse party.

"Leave shall be freely given when justice so requires."

Foman V. Davis 371 U.S. 178 (1962)

"The Honorable Supreme Court stated in its opinion that this mandate is to be heeded."

The Honorable United States Court of Appeals for the Ninth Circuit has stated in no uncertain terms that they review denial of leave to amend for abuse of discretion stating, "but such denial is strictly reviewed in light of the strong policy permitting amendment." In Re: Rogstad 126 F.3d 1224 (9th Cir. 108 1997) citing Texaco Incorporated v. Ponsoldt 939 F.2d 794, 798 (9th Cir. 1991)

The Second Circuit held that a pro se litigant "should be afforded an opportunity to fairly freely amend his complaint." Holmes v. Goldin 615 F.2d 83, 85 (2d Cir. 1980)(*per curiam*).

This Honorable Court should rule accordingly and reverse the judgment of the United States District Court and the Ninth Circuit, and allow Plaintiff this Appellant to amend his complaint if the Court finds his complaint insufficient for stating a claim upon which relief may be granted, for violation of 11 U.S.C. § 362.

## III. THE MAGISTRATE JUDGE'S ORDER, FINDINGS AND RECOMMENDATIONS THAT THE AUTOMATIC STAY OF THE BANKRUPTCY COURT NO LONGER CONTINUED AFTER PLAINTIFF'S DISCHARGE ON JUNE 5, 2000 IS CLEARLY ERRONEOUS, CONTRARY TO LAW AND THE FACTS OF THE CASE

The Magistrate Judge's order and findings and recommendations that the Automatic Stay of the Bankruptcy Court no longer continued after Plaintiff's discharge on June 5, 2000 is clearly erroneous contrary to law and should be reversed because of the following:

The Magistrate Judge is under the mistaken belief that the granting of a discharge automatically terminates the Automatic Stay as to property of the Estate.

A case is not closed simply because a discharge of the debtor has been granted. In re Michael, 163 F.3d 526 (9th Cir. 1998)

The relevant and controlling statue in this matter is 11 U.S.C § 362 (c)(1), which provides:

> (1) The stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
>
> (2) the stay of any other act under subsection (a) of this section continues until the earliest of –
>
> (A) the time the case is closed;
>
> (B) the time the case is dismissed; or
>
> (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12,

> or 13, of this title, the time a discharge is granted or denied.

Because William J. Prater, dba Prater Tree Farm's property was property of his Property of the Bankruptcy Estate and remained property of the estate until the closing of the Bankruptcy Case on June 11, 2002, the provisions of subpart (1) are controlling, i.e., the automatic stay continues until the Trustee abandons or sells the property. The provisions of subpart (2) (including subpart (C) which says that the automatic stay terminates when a discharge is granted) do not apply, because subpart (2) does not affect the automatic stay with respect to acts against "property of the estate."

### A. Property of the Bankruptcy Estate

In order to properly evaluate the judgments of the United States District Court Judges and the Ninth Circuit we should first determine the applicable law as to Property of the Estate.

Property of the Bankruptcy Estate is defined under 11 U.S.C. § 541 in relevant part as follows;

**§ 541. Property of the Estate**

> "(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> "(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in

> property as of the commencement of the case." See also: United States v. Whiting Pools, Inc., 462 U.S. 198 (1983)

Section 541 embodies the essence of the Bankruptcy Code. It creates the Bankruptcy Estate, which consists of all the property that will be subject to the Bankruptcy Court. Congress' intent to define the property of the Estate in the broadest possible sense is evident of the language of the statute, which defines the scope of the Estate property to be all legal or equitable interest wherever located and by whomever held. It would be hard to imagine language that would be more encompassing.

Real property rights and interests comprise one of the largest classes of property that may become part of the debtor's estate. The provision of section 541 (a)(1) that the debtor's estate shall include "all legal or equitable interests of the debtor in property as of the commencement of the case" is extremely broad and includes any such rights and interests of the debtor in real property.

5 L King, Collier on Bankruptcy (15th ed.) § 541.05

California State Courts have recognized the broad jurisdiction over the property of the Estate and any controversies involving that property.

> "Under federal law: "The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." (28 U.S.C., § 1334 (d), emphasis added) congress has thus granted the bankruptcy courts the broadest jurisdiction possible over property of the bankruptcy estate and over any controversies surrounding or involving that property. Geary

Street, L.P. v. Superior Court of the State of California for the County of San Francisco (1990) 219 Cal.App.3d 1186
(1 L. King, Collier on Bankruptcy (15th ed. 1989) ¶ 3.01, [. 3-13.)

Based on the foregoing there is absolutely no doubt that all the real property, cash, and other assets of William J. Prater, dba Prater Tree Farm was property of the Bankruptcy Estate, which the defendant Mr. Ormiston and his counsel were trying to obtain or control.

**B. The hearing on Defendant's Motion to Dismiss**

On Wednesday October 29, 2003 defendant's motion to dismiss was heard before the Honorable Kimberly J. Mueller United States Magistrate Judge.

During this proceeding William J. Prater as a Pro Se litigant made it plain to the Court in no uncertain terms that 11 U.S.C. § 362 (c)(1) was the controlling statue.

"MR. PRATER: That's a confusing part in some areas, but actually, the controlling statue is 11 U.S.C. § 362 (c)(1) and that's where a lot of attorneys are confused, and I don't want it to be any confusion in this case, 11 U.S.C. § 362 (c)(1) says, "a stay of an act against property of the estate, "under subsection (A) of this section continues, "until such property is no longer property of the estate." So the discharge doesn't affect that.

And the stay 11 U.S.C. 362 as property of the estate continues, "until the case was closed on June 11th, 2002," and there's no doubt about it."

This Honorable Court should rule that Mr. Prater was correct in interpreting 11 U.S.C. 362 (c)(1) as it

pertains to the District Court case and this petition. This Honorable Court should correctly interpret 11 U.S.C. 362 (c) (1) according to its plain meaning and reverse the judgment of the United States District Court Eastern District of California, and the United States Ninth Circuit Court of Appeals.

## IV. THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT MISAPPREHENDED APPLICABLE LAW AND OR OVERLOOKED MANY IMPORTANT CRITICAL ISSUES AND MADE ERRONEOUS RULINGS BASED ON THOSE CRITICAL ISSUES

Based on the foregoing we know from correctly interpreting 11 U.S.C.§ 362, Federal Rule of Civil Procedure 8 and applicable law that the United States District Court and the Ninth Circuit made erroneous rulings, but they intentionally disregarded one of the most critical issues involved in this case.

The most critical issue was that United States District Court erroneously ruled that the property of the Bankruptcy Estate was abandoned back to William J. Prater, dba Prater Tree Farm before the closing of the Bankruptcy Case when they knew better. Based on this erroneously ruling as to when the Property of the Estate was abandoned the Court further ruled that defendant's motion to dismiss Plaintiff's complaint for failure to state a claim should be granted and that the entire action should be dismissed.

### A. Who knows better than Trustee Kenny W. Flinn an Officer of the Court when he abandoned the real property owned by William J. Prater, which was part of the Bankruptcy Estate back to William J. Prater dba Prater Tree Farm

Very importantly, counsel for the defendant Mr. Ormiston knowing better convinced the Magistrate Judge that all the property of the Bankruptcy Estate of William J. Prater, dba Prater Tree Farm was abandoned in December 2000, which was in fact false, and Mr. Ormiston's counsel knew it was false when they made that allegation to the Court.

United States Bankruptcy Court Trustee Kenny W. Flinn submitted a declaration under penalty of perjury, which was filed in the Butte County Superior Court that the real property involved in the estate was abandoned back to William Prater, at the close of the Bankruptcy Proceedings. (Pet. App. 28a-29a)

More importantly, in order to clarify the issues and allegations for all time plaintiff this appellant submitted a "Supplemental Declaration of Plaintiff William J. Prater in Opposition to Magistrate Judge's Finding and Recommendations and Defendant's Motion to Dismiss." (Pet. App. 30a-31a)

Contained in the declaration as (Exhibit A) was a declaration made under penalty of perjury captioned as "Declaration of Trustee Kenny W. Flinn Re: Abandonment of Real Property Owned by William J. Prater

On page 1, line 22 Mr. Flinn an officer of the court states under penalty of perjury, "This Declaration has been prepared to reiterate that I did in fact abandon all the real property involved in this estate back to William J. Prater, at the close of the court proceedings in the bankruptcy on June 11, 2002 and not before."

Mr. Flinn's declarations made under penalty of perjury renders Mr. Ormiston's contrary allegations meaningless.

Most importantly, the defendants have never objected to the declarations of Trustee Kenny W. Flinn being judicially noticed or submitted into evidence.

The declaration of Kenny W. Flinn Bankruptcy Trustee an officer of the court is not subject to reasonable dispute because it is generally known within the territorial jurisdiction of this Honorable Court and the Butte County Superior Court and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, and Mr. Flinn would testify to the exact facts stated in his declaration.

The sole basis of defendant's motion to dismiss is that Plaintiff cannot state a claim for relief because the real property of William J. Prater was abandoned before they filed their lawsuits against William J. Prater and his property, which is pure nonsense.

Mr. Flinn's declaration alone dispels those allegations.

Defendant and his counsel are searching far and wide for a document from Mr. Flinn where he abandoned the "property of the estate" before the closing of the Bankruptcy Case on June 11, 2002.

Their efforts are futile because they have not, and cannot produce any such document because none exists.

On December 16, 2003 the Honorable Morrison C. England Jr. issued an order (Pet. App.6a-7a) stating that the court had conducted a *de novo* review of this case, and had carefully reviewed the entire file. This means that the court reviewed both declarations of Trustee Kenny W. Flinn as to when property of the estate was abandoned back to William

J. Prater, dba Prater Tree Farm. It was an abuse of discretion for the court not to rely on Mr. Flinn's declarations, when making their rulings.

The Magistrate Judge is under the mistaken belief that when the Trustee filed the final report that somehow determined when the property of the estate was abandoned by the Bankruptcy Trustee, not taking in consideration Mr. Flinn's declaration and the fact that the property of the Bankruptcy Estate involved several properties, cash, and several pieces of equipment, not just the Clipper Mills property. Even if all the property was abandoned back to debtor William J. Prater dba Prater Tree Farm prior to the closing of the bankruptcy case, which it was not, the property still remained property of the estate until the closing of the case.

**1. Defendant / Respondent documents submitted for judicial notice actually supported Plaintiff / Petitioner's complaint**

Notwithstanding, defendant's assertions their own documents submitted for judicial notice in support of their motion to dismiss actually confirm this appellant's contentions as to when the Property of the Estate was abandoned back to William J. Prater, dba Prater Tree Farm.

Contained in defendant's request for judicial notice is was, which is an order on trustee's motion for approval of compromise and transfer of real properties proof of service.

Contained in the exhibit was a settlement agreement styled as (Exhibit "A"). In this settlement agreement is subsection (B), which states as follows:

> "Among the assets of the Bankruptcy Estate are four parcels of real property located in

> Plumas, Butte, and Sierra Counties State of California ("Properties"). These Properties are described in the bankruptcy schedules filed by W. Prater:
>
> Gibsonville Property – 258 acres in Plumas and Sierra Counties
> Clipper Mills Property – 1.40 acres in Butte County
> Clipper Mills Property – 5.25 acres in Butte County
> Onion Valley Property – 78 acres in Plumas County"

One should ascertain that the bankruptcy estate contained more than just the Clipper Mills property.

In addition, on page (6) of this settlement agreement in subsection (4) styled as

**Acknowledgment of Flinn's Intentions to Close the Bankruptcy Case**, states as follows:

> "Closing W. Prater's bankruptcy case would mean that Flinn would not pursue the recovery of any of these potential assets, and that any interest of the bankruptcy estate in those potential assets will be abandoned."

In accordance with the settlement agreement signed by several parties, Mr. Flynn then sought authorization from the Bankruptcy Court to abandon the properties and filed a motion with the court seeking authorization to abandon the properties, which was granted by the court.

The Bankruptcy Case was a long protracted case due to a Family Law dispute in the State Court. William

J. Prater, dba Prater Tree Farm paid out several hundred dollars during the Bankruptcy Case.

This settlement agreement ending the Family Law Case and the Bankruptcy Case was due mainly to the efforts of one respected attorney, the trustee, and William J. Prater. The settlement agreement agreed to by all the parties provided that all the real property owned by William J. Prater, dba Prater Tree Farm would be abandoned back to William J. Prater, dba Prater Tree Farm at the closing of the Bankruptcy Case, which it was and not before.

Appellee's contentions that it was abandoned back to William J. Prater, dba Prater Tree Farm before the closing of the Bankruptcy Case are meritless.

## V. THE FILING AND MAINTENANCE OF THE TWO STATE COURT LAWSUITS DURING THE PENDENCY OF A BANKRUPTCY CASE WITHOUT OBTAINING ANY RELIEF FROM STAY V IOLATED THE AUTOMATIC STAY OF THE BANKRUPTCY COURT

### A. Defendant's complaints filed in state Court in Violation of the Automatic Stay

The filing of a Bankruptcy Petition is a caveat to all the world and in effect an attachment and an injunction Mueller v. Nugent, 184, U.S. 1 (1902) See Also In Re: Gruntz 202 F. 3d 1074 (9th Cir. 2000)

It is beyond doubt that defendants / respondent filing and maintenance of the two Butte County Superior Court Cases filed against William J. Prater, and Prater Tree Farm during the pendency of the Bankruptcy Case violated the Automatic Stay of the Bankruptcy Court. Defendants were in contempt of the Bankruptcy Court for filing of the

cases to obtain property of the Bankruptcy Estate and to exercise control over Property of the Estate.

The Automatic Stay is applicable to all entities and Mr. Ormiston and his counsel were bound by its terms.

As recognized by the Ninth Circuit, the Section 362 automatic stay is a critical protection of bankruptcy law and quite broad in its scope"

> "It is designed to effect an immediate freeze of the *status quo* by precluding and nullifying post-petition actions, judicial or non-judicial, in non-bankruptcy forum against the debtor or affecting the property of the estate. The Automatic stay plays a vital and fundamental role in bankruptcy." In Re Ramirez 183 BR 583 (9th Cir. BAP 1995) Citing: Hillis Motors Inc. v. Hawaii Automobile Dealers Association 997 F.2d 581(9th Cir. 1993)

"Any equitable exception to automatic stay should be narrow and applied only in extreme circumstances."

In Re: Shamblin 890 F.2d 123 (9th Cir. 1989)

Exceptions to the Automatic Stay should be narrowly construed.
In Re: Stringer 847 F.2d 549 C.A. 9 (Cal), (1988)

Appellee David C. Ormiston Jr. and his counsel never sought a determination from the Bankruptcy Courts whether the filing of the State Court Lawsuits might violate the automatic stay of the Bankruptcy Court. One phone call to the trustee or the attorney representing the trustee or the court would have revealed to them that the automatic stay of the Bankruptcy Court was in effect when they filed their State Court Lawsuits, and filing of the lawsuits would

violate the automatic stay. Mr. Ormiston and his counsel had a duty to seek a determination from the Court.

> "Not even a good faith mistake of law or a legitimate dispute as to legal rights relieve a willful violator of the consequence of the act. A party takes a calculated risk when it undertakes to make its own determination of what the stay means."

Where the automatic stay is concerned, it is far better to be a timid soul who seeks a court determination of the limits of the stay, rather than to fail while daring greatly. In Re. Pace, No. 92-1761 (9th Cir. 1993)

## VI. CONCLUSION

Plaintiff William J. Prater understands the difficulties involved in ruling for a Pro Se litigant against a large law firm located in the same city as the Court, but "equal justice for all" should be applied in this case.

There is absolutely no doubt and is undisputed that defendants filed or caused to be filed two different lawsuits against William J. Prater, Prater Tree Farm in the Butte County Superior Court Oroville California during the pendency of the Bankruptcy Case in order to obtain property of the Bankruptcy Estate and to exercise control over property of the estate.

Defendant / respondent David C. Ormiston Jr. had knowledge of the Bankruptcy filing but in arrogant defiance of Federal Law filed his lawsuits attempting to obtain property of the Bankruptcy Estate and to exercise control over property of the estate.

The defendant did not obtain a relief from stay as required by applicable Bankruptcy Law in order to file the two complaints.

A brief perusal of defendant's complaints filed in the Butte County Superior Court reveal that they are seeking over two million dollars in damages and fee title to a portion of the property that was contained in the Bankruptcy Estate.

Years ago the United States Supreme Court stated that the filing of a Bankruptcy Petition is a caveat to all the world, and everyone is bound by its terms. Mr. Ormiston was bound by the terms of 11 U.S.C. § 362 the Automatic Stay of the Bankruptcy Court, and even the service of a summons on William J. Prater was a violation of the Automatic Stay.

William J. Prater sent at least two letters to counsel for the defendant advising him to dismiss the State Court lawsuits and return matters to the *status quo*. Defendant and their counsel have refused.

The State Court Judge questioned counsel, why they did not just dismiss the lawsuits against William J. Prater, Prater Tree Farm, and have stayed proceedings in state court based on allegations pertaining to violations of the automatic stay of the bankruptcy court by Mr. Ormiston.

The defendant's motion to dismiss is based entirely on the premises that all the property of the Bankruptcy Estate was abandoned back to William J. Prater before the closing of the Bankruptcy Case on June 11, 2002.

Defendants nor their counsel cannot ever produce a document from Trustee Kenny W. Flinn the Trustee in the Bankruptcy Case where he abandoned the Property of the

Bankruptcy Estate back to William J. Prater before the closing of the Bankruptcy Case.

William J. Prater, Trustee Kenny W. Flinn and everyone connected with the Bankruptcy Case knows that the Property of the Bankruptcy Estate was abandoned back to William J. Prater at the close of the Bankruptcy Case on June 11, 2002 because they signed a settlement agreement that they would do so, the property was subsequently abandoned pursuant to 11 U. S.C. § 554 (c) at the close of the Bankruptcy case.

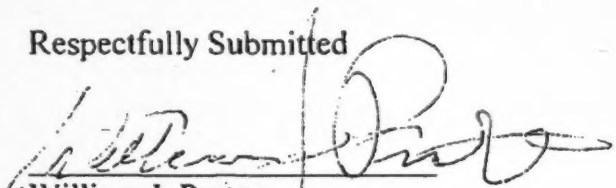
Plaintiff William J. Prater represents that his complaint does state a claim for relief under the liberal standards of Federal Rule of Civil Procedure 8.

Plaintiff William J. Prater has suffered injury in fact and is suffering ongoing damages caused by the defendants' actions, and the injury will be redressed by this Court.

WHEREFORE, based on the foregoing, petitioner William J. Prater prays that the petition for Certiorari be granted.

DATED: July 22, 2005

Respectfully Submitted



William J. Prater
Petitioner Pro Se

No. 05-

# In the Supreme Court of the United States

WILLIAM J. PRATER

Petitioner,

v.

DAVID C. ORMISTON JR.

Respondent.

**On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit**

## APPENDIX OF THE PETITION FOR A WRIT OF CERTIORARI

William J. Prater
Post Office Box 23
Clipper Mills, California 95930
(530) 675-2678
Pro Se

Counsel for Petitioner William J. Prater

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FILED
FEB 16 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| WILLIAM J. PRATER<br>Plaintiff-Appellant,<br>v.<br>DAVID C. ORMISTON JR.<br>Defendant-Appellee. | No. 04 - 15096<br>D.C. No. CIV-03-01770-MCE<br>MEMORANDUM* |

Appeal from the Unit State District Court
For the Eastern District of California
Morrison C. England, District Judge, Presiding

Submitted February 7, 2005**

Before: FERNANDEZ, GRABER, and GOULD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

William Prater appeals pro se the district court's judgment dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), his action alleging that David Ormiston violated the automatic stay in his bankruptcy proceeding when the Ormiston Family Association filed a state court action against him regarding a dispute over an easement across Prater's property. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo. *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). We affirm.

Prater was granted a discharge in bankruptcy on June 5, 2000. The bankruptcy court granted the trustee's motion to abandon the property in question on December 19, 2000, and the property was not listed as an asset of the estate on a report filed by the trustee to the bankruptcy court in May 2001. The Ormiston Family Association filed their state court action on April 25, 2002. Dismissal was proper because at the time of the filing of the state court action, the property in question was no longer part of Prater's bankruptcy estate. See 11 U.S.C. § 362(c)(1).

The district court did not abuse its discretion in denying Prater leave to amend his complaint. See Reddy v. Litton Industries, Inc., 912 F.2d 291, 296 (9th Cir 1990).

We deny all pending motions.

**APPIRMED.**

**FILED**
Nov 16 2003
CLERK US DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| WILLIAM J. PRATER<br>Plaintiff,<br>v.<br>DAVID C. ORMISTON JR.<br>Defendant. | No. CIV-03-01770-MCE KJM PS<br>ORDER AND<br>FINDINGS AND<br>RECOMMENDATIONS |

Defendant's motion to dismiss came on regularly for hearing October 29, 2003. Plaintiff appeared in Propria persona. Michael Williams appeared for defendant. Upon review of the documents in support and opposition, upon hearing the arguments of plaintiff and counsel, and good cause appearing, THE COURT FINDS AS FOLLOWS:

In this action, plaintiff alleges defendant violated the automatic stay provisions of the Bankruptcy Act by filing an action against plaintiff in state court while plaintiff's bankruptcy action was pending. Plaintiff seeks monetary damages. Defendant moves to dismiss, contending plaintiff cannot state a claim because, at the time the state court action was filed, plaintiff had been discharged from bankruptcy.

Under 11 U.S.C. § 362 (c)(2), the automatic stay continues until the earliest of one of three events (case closed, case dismissed, or discharge). In this case, it is undisputed plaintiff was discharged on June 5, 2000. Under 11 U.S.C. § 362(c)(2)(c), the stay no longer continued after that date. The state complaint at issue here was not filed until April 25, 2002. Under subdivision (c), plaintiff, therefore, cannot state a claim and this action should be dismissed.[1]

Both plaintiff and defendant request this court take judicial notice of certain documents filed in the bankruptcy action. Those requests will be granted. Plaintiff also submits the declaration of the bankruptcy trustee pertaining to the abandonment of real property. The declaration is not a matter for judicial notice. Fed. R. Evid. 201. The court therefore will decline to take judicial notice of the bankruptcy trustee's declaration.

Accordingly, IT IS HEREBY ORDERED that the requests for judicial notice are granted with respect to documents filed in the bankruptcy action; and

IT IS HEREBY RECOMMENDED that:

1. The motion to dismiss be granted; and
2. This action be dismissed

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).

---

[1] Plaintiff contends 11 U.S.C. § 362(c)(1) is the applicable provision in this matter. The Clipper Mills property at issue was abandoned no later than May of 2001 when the bankruptcy trustee filed the final report and the property was not listed as property of the bankruptcy estate. Because the state court action was filed after the May 2001 date, there was no violation of the automatic stay.

Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 5, 2003

K. J. MUELLER
UNITED STATES MAGISTRATE JUDGE

FILED
DEC 16 2003
CLERK US DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| WILLIAM J. PRATER, et al.,<br>Plaintiff,<br>v.<br>DAVID C. ORMISTON JR.,<br>Defendant. | D.C. No. CV-03-01770 -MCE<br><br>ORDER |

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. 636, et seq., and Local Rule 72-302.

On November 6, 2003, the magistrate judge filed findings and recommendations herein which were served the parties and which contained notice that any objections to the findings and recommendations were to be filed within ten days. Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed November 6, 2003, are adopted in full;

2. The motion to dismiss is granted; and

3. The action is dismissed.

DATED: DEC 15 2003

Morrison C. England, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| WILLIAM J. PRATER<br>Plaintiff-Appellant,<br>v.<br>DAVID C. ORMISTON JR.<br>Defendant-Appellee. | No. 04 - 15096<br>D.C. No. CIV-03-01770-MCE<br><br>**JUDGMENT** |

Appeal from the United States District Court for the Eastern District of California (Sacramento).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered Wednesday, February 16, 2005

FILED
APR 25 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| WILLIAM J. PRATER<br>Plaintiff-Appellant,<br>v.<br>DAVID C. ORMISTON JR.<br>Defendant-Appellee. | No. 04 - 15096<br>D.C. No. CV-03-01770-MCE<br>Eastern California (Sacramento)<br>ORDER |

Before: FERNANDEZ, GARBER, and GOULD, Circuit Judges.

The panel has voted to deny the petition for rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

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dba PRATER TREE FARM
Post Office Box 23
Clipper Mills, California 95930
Telephone: (530) 675-2678

Plaintiff Pro Se

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| WILLIAM J. PRATER, dba PRATER TREE FARM<br><br>Plaintiffs,<br><br>v.<br><br>DAVID C. ORMISTON JR.,<br><br>Defendant. | Case No. CIV.S-03-177 MCE KIM-PS<br><br>**OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS**<br><br>**Fed.R.Civ.P. 72(b); L.R. 72-303]**<br>JUDGE: Honorable Morrison C. England |

## OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

### I.
### INTRODUCTION

On August 26, 2003 Plaintiff's William J. Prater filed a complaint in the United States District Court Eastern District of California, Sacramento California for defendant's violation of 11 U.S.C. § 362 and 362 (h) the Automatic Stay of the Bankruptcy Court.

The defendant subsequently filed a motion to dismiss alleging that plaintiff's complaint failed to state a claim upon, which relief could be granted.

Defendant's motion to dismiss was heard on October 9, 2003 before the Honorable Kimberly J. Mueller. Plaintiff appeared as a Pro Se litigant and attorney Michael R. Williams appeared for the defendant.

On November 6, 2003 the Court issued its order and findings and recommendations.

The findings are "contrary to law", "clearly erroneous" and Plaintiff William J. Prater, and Prater Tree Farm objects to the findings and recommendations of Magistrate Judge Mueller, and respectfully requests *de novo* review of those findings and recommendations and represents as follows:

## II.

## THE MAGISTRATE JUDGE'S ORDER AND FINDINGS AND RECOMMENDATION THAT THE AUTOMATIC STAY OF THE BANKRUPTCY COURT NO LONGER CONTINUED AFTER PLAINTIFF'S DISCHARGE ON JUNE 5, 2000 IS "CLEARLY ERRONEOUS" AND "CONTRARY TO LAW", AND THE FACTS

**A. Plaintiff's First Objection**, The Magistrate Judge's order and findings and recommendation that the Automatic Stay of the Bankruptcy Court no longer continued after Plaintiff's discharge on June 5, 2000 is "clearly erroneous" and "contrary to law" and should be reversed because of the following:

The Magistrate Judge is under the mistaken belief that the granting of a discharge automatically terminates the Automatic Stay as to property of the Estate.

The relevant and controlling statue in this matter is 11 U.S.C section 362 (c), which provides:

> (1) The stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
>
> (2) the stay of any other act under subsection (a) of this section continues until the earliest of –
>
> (A) the time the case is closed;
>
> (B) the time the case is Dismissed; or
>
> (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13, of this title, the time a discharge is granted or denied.

Because William J. Prater's property was property of his Chapter 7 Estate and remained property of the estate until the closing of the Bankruptcy Case on June 11, 2002, the provisions of subpart (1) are controlling, i.e., the automatic stay continues until the Trustee abandons or sells the property. The provisions of subpart (2) (including subpart (C) which says that the automatic stay terminates

when a discharge is granted) do not apply, because subpart (2) does not affect the automatic stay with respect to acts against "property of the estate."

## III.
## THE FILING AND MAINTENANCE OF THE TWO STATE COURT LAWSUITS DURING THE PENDENCY OF A BANKRUPTCY CASE WITHOUT OBTAINING RELIEF FROM STAY VIOLATED THE AUTOMATIC STAY OF THE BANKRUPTCY COURT

### A. Defendant's complaints filed in State Court in Violation of the Automatic Stay

Defendant David C. Ormiston Jr. acting in concert with others filed or caused to be filed complaints against a good portion of the senior citizens of the small town of Clipper Mills California including William J. Prater.

The first complaint filed by defendant David C. Ormiston Jr. against William J. Prater and other senior citizens was filed on April 25, 2002.

The second complaint and amended complaint was filed by the defendant David C. Ormiston Jr. against William J. Prater and other senior citizens, on May 28, 2002.

Both complaints were filed against William J. Prater during the pendency of his Bankruptcy Case while the automatic stay was in effect.

A true and exact copy of defendant's complaints were attached to Plaintiff William J. Prater's complaint in this Honorable Court as "Exhibit (A) and (B)", and incorporated into the complaint by reference.

Both of defendant's frivolous complaints allege causes of actions for *inter alia* interference with an easement, interference with economic advantage, to quiet title to fee simple interest.

The defendant in the cause of action for interference with an easement is seeking damages in excess of one million dollars. The defendant in the cause of action for interference with economic advantage is seeking damages in excess of one million dollars. The defendant is also seeking fee title to a portion of the real property of William J. Prater.

**B. Plaintiff's complaint filed in United States District Court for violation of the Automatic Stay**

Contained in William J. Prater and Prater Tree Farms complaint for money damages, violation of 11 U.S.C. § 362, 11 U.S.C. § 362 (b) (Automatic Stay) filed in the United States District Court August 26, 2003 are allegations which state a claim upon which relief can be granted, and are as follows:

> "8. Defendant David C. Ormiston Jr. acting in concert with others did willfully, intentionally with malice in violation of the Automatic Stay of the Bankruptcy Court file or caused to be filed on April 25, 2002 a complaint in Butte County Superior Court against Debtor William J. Prater. A copy of the Complaint is incorporated herein attached hereto and referenced as (Exhibit "A").

9. Defendant David C. Ormiston Jr. acting in concert with others did willfully, intentionally with malice in violation of the Automatic Stay of the Bankruptcy Court file or caused to be filed on May 28, 2002 an amended complaint in the Butte County Superior Court against Debtor William J. Prater. A copy of the Complaint is incorporated herein attached hereto and referenced as (Exhibit "B").

10. Plaintiff is informed and believes and thereon alleges that defendant failed to seek a relief of stay from the United States Bankruptcy Court Eastern District of California Sacramento California, before filing a lawsuit against William J. Prater in the Butte County Superior court Oroville California.

13. The defendant did by filing the lawsuits in the Butte County Superior Court commit acts to illegally obtain possession of property of the Bankruptcy Estate in violation of the Automatic Stay of the Bankruptcy Court.

14. The defendant by filing the lawsuit in the Butte County Superior Court without obtaining relief from stay from the Bankruptcy Court did illegally commit acts to exercise control over property of the Bankruptcy Estate.

15. Defendant David C. Ormiston Jr. by filing or causing to be filed a lawsuit in the

> Butte County Superior Court during the pendency of the Bankruptcy Case did maliciously commit acts to obtain property from the Bankruptcy Estate while the Automatic Stay of the Bankruptcy Court was in effect in violation of the Automatic Stay of the Bankruptcy Court."

There is no doubt that the above allegations contained in Plaintiff William J. Prater's complaint state a claim for violation of the Automatic Stay of the Bankruptcy Court.

The United States Code Section 362 states in relevant part as follows:

> **§ 362. Automatic Stay**
> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay applicable to all entities, of ---
>
> > (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

The Magistrate Judges finding on (page 2), (footnote1, line 24) of the order and findings, and recommendation is clearly erroneous and contrary to the facts of this case, and of the Bankruptcy case.

Footnote (1) states as follows:

> "Plaintiff contends 11 U.S.C. § 362(c)(1) is the applicable provision in this matter. The Clipper Mills property at issue was abandoned no later than May of 2001 when the bankruptcy trustee filed the final report and the property was not listed as property of the bankruptcy because the state Court action was filed after the May 2001 date, there was no violation of the automatic stay."

The Magistrate Judge found that the Clipper Mills property was abandoned no later than May of 2001 when the bankruptcy trustee filed the final report, and the property was not listed as property of the estate, and that the complaint did not state a claim upon which relief could be granted.

**C. Plaintiff's Objection**

The Magistrate Judge knew or should have known that her findings and recommendations were clearly erroneous and contrary to law and not according to the facts of the case and applicable law.

The Honorable Kimberly J. Mueller had in her possession a signed declaration from the Bankruptcy Trustee Kenny W. Flinn stating that the real property, which is property of the estate was abandoned back to William J. Prater at the closing of the Bankruptcy Proceedings, as was contained in Plaintiff's request for judicial notice as (Exhibit "C").

The Magistrate Judge is under the mistaken belief that when the Trustee filed the final report that somehow determined when the property of the estate was abandoned

by the Bankruptcy Trustee, not taking in consideration that the property of the Bankruptcy Estate involved several properties, cash, and several pieces of equipment, not just the Clipper Mills property.

Bankruptcy Trustee Kenny W. Flinn has signed a declaration submitted to this Honorable Court that he abandoned the Property of the Estate back to William J. Prater at the close of the Bankruptcy Case.

Defendant and his counsel are searching far and wide for a document from Mr. Flinn where he abandoned the "property of the estate" before the closing of the Bankruptcy Case on June 11, 2002.

Their efforts are futile because they have not, will not and cannot produce any such document because none exists.

**1. Defendant's request for judicial notice**

The defendants have submitted a request for judicial notice in support of motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which was probably an error in judgment.

Contained in defendant's request for judicial notice is (Exhibit "B"), which is an order on trustee's motion for approval of compromise and transfer of real properties proof of service.

Contained in the exhibit is a settlement agreement styled as (Exhibit "A"). In this settlement agreement is subsection (B), which states as follows:

> "Among the assets of the Bankruptcy Estate are four parcels of real property located in Plumas, Butte, and Sierra Counties State of California ("Properties"). These Properties are described in the bankruptcy schedules filed by W. Prater:

Gibsonville Property – 258 acres in Plumas and Sierra Counties

Clipper Mills Property – 1.40 acres in Butte County
Clipper Mills Property – 5.25 acres in Butte County

Onion Valley Property – 78 acres in Plumas County"

One should ascertain that the bankruptcy estate contained more than just the Clipper Mills property.

In addition, on page (6) of this settlement agreement in subsection (4) styled as **Acknowledgment of Flinn's Intentions to Close the Bankruptcy Case**, states as follows:

> "Closing W. Prater's bankruptcy case would mean that Flinn would not pursue the recovery of any of these potential assets, and that any interest of the bankruptcy estate in those potential assets will be abandoned."

**D. What was property of the Bankruptcy Estate in Bankruptcy Case 95-27249-B filed by William J. Prater that defendants are attempting to obtain through their State Court Lawsuits?**

Property of the Bankruptcy Estate is defined in 11 U.S.C. § 541. This section defines property of the estate and specifies what property becomes property of the estate.

///

///

> "The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a) the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property." United States v. Whiting Pools, Inc., 462 U.S. 198 (1983) See also: Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001)

**Plaintiff's objection**: The finding that defendants committed no acts to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate because the property of the Bankruptcy Estate was abandoned no later than May of 2001 is clearly erroneous, contrary to law, and the facts of this case, and should be reversed.

## IV.
## PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE SHOULD HAVE BEEN GRANTED

In the hearing on the motion to dismiss under 12 (b)(6) the Magistrate Judge granted both Plaintiff and defendant requests for judicial notice by stating: "Those requests will be granted." The Court then goes on the to state: "Plaintiff also submits the declaration of the bankruptcy trustee pertaining to the abandonment of the property, and that the declaration is not a matter for judicial notice, and that the Court will decline to take judicial notice of the bankruptcy trustee's declaration."

**Plaintiff's objections:** The Magistrate Judge could ill afford to take judicial notice of Trustee Kenny W.

Flinn's Declaration in that it stated the true facts of this case, pertaining to the abandonment of the property of the estate. The Magistrate Judge's findings are clearly erroneous, and not based on the facts of this case. Denial of Judicial Notice of Mr. Flinn's declaration would misconstrue the true real facts of this case

**A. The declaration of Trustee Kenny W. Flinn is a matter of public record and subject to Judicial Notice pursuant to Federal Rule of Evidence 201.**

After the bankruptcy case was closed on June 11, 2002 and when the property of the estate was no longer property of the bankruptcy estate, William J. Prater filed a cross-complaint against the defendant in the Butte County Superior Court for several causes of actions for their egregious conduct.

Contained in Plaintiff's request for judicial notice filed and served herewith in support of his opposition to dismissal of his complaint under 12 (b)(6) is a document entitled declaration of cross-complainant William J. Prater in support of opposition to cross-defendants demurer to cross-complainant's third cause of action in the amended cross-complaint.

This declaration was filed on April 9, 2003 in the Butte County Superior Court and is a filed stamped certified copy as the Butte County Superior Court stamp indicates on the back of the declaration.

Contained in this same declaration as (Exhibit "C") is the same declaration of Trustee Kenny W. Flinn regarding Re: Abandonment of Real Property of William J. Prater dated 2-10-03, stating that he did in fact abandon the

real property involved in the bankruptcy estate back to William Prater at the close of the court proceedings in bankruptcy.

Surely, this Honorable Court is able to take judicial notice of certified filed stamped copies of documents filed in the Butte County Superior Court.

Most importantly, the defendants in any proceeding have never objected to the declaration of Trustee Kenny W. Flinn being judicially noticed.

The declaration of Kenny W. Flinn Bankruptcy Trustee is not subject to reasonable dispute because it is generally known within the territorial jurisdiction of this Honorable Court and the Butte County Superior Court and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, and Mr. Flinn would testify to the exact facts stated in his declaration.

Plaintiff William J. Prater respectfully requests that this Honorable Court grant his request for judicial notice, which is incorporated herein by reference filed and served herewith.

In the alternative Plaintiff William J. Prater respectfully requests an evidentiary hearing where Trustee Kenny W. Flinn could testify orally as to when he abandoned the property of the estate back to William J. Prater.

**Plaintiff's Objection:** Based on the foregoing Plaintiff objects to denial of his request for judicial notice.

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## V.
## PLAINTIFF FURTHER OBJECTS TO THE ORDER AND FINDINGS AND RECOMMENDATIONS BECAUSE THE ORDER IS AMBIGUOUS

Plaintiff William J. Prater further objects to the order and findings and recommendations of the Magistrate Judge's ruling in that the order and findings and recommendations are ambiguous. The order and findings and recommendations do not state whether or not the motion to dismiss should be granted with or without prejudice.

Plaintiff has requested if the Court finds his complaint insufficient that he be granted leave to amend his complaint. The order and findings and recommendations do not state whether or not the complaint should be dismissed with or without leave to amend.

**A. Plaintiff further objects to the order and findings and recommendations of the Honorable Kimberly J. Mueller because she failed to follow the appropriate standard of review for the motion to dismiss, and for violations of the automatic Stay.**

Plaintiff further objects to the order and findings and recommendations in that the Magistrate Judge did not adhere to the applicable standard of review for motions to dismiss under Federal Rule of Civil Procedure 12 (b)(6).

This standard of review for 12 (b)(6) motions is that they are disfavored motions. Many Courts view Rule 12 (b)(6) motions with "disfavor" because of the lesser role pleadings play in Federal practice and the liberal policy re

amendment: "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." Gilligan v. Jamco Develop. Corp108 F3d 246, 249 . (9th Cir. 1997).

A 12 (b)(6) dismissal is proper only in "extraordinary" cases. United States v. Redwood City 640 F.2d 963, 966 (9th Cir. 1981).

The complaint must be construed in the light most favorable to plaintiff Parks School of Business, Inc. v. Symington 51 F.3d 1480, 1484 (9th Cir. 1995)

Federal courts are particularly liberal in construing "inartful pleading" by parties appearing pro se (without counsel) Hughes v. Rowe 449 US 5,9, 101 S.Ct. 173, 176, (1980).

Plaintiff requested that if the Court found his complaint insufficient that he be allowed leave to amend his complaint. The Magistrate Judge did not grant him leave to amend his complaint, as a practical matter leave to amend is almost always granted by the court. Allen v. City of Beverly Hills 911 F.2d367, 373 (9th Cir. 1990).

**1. Applicable standards of review for violation of the automatic stay.**

Plaintiff further objects to the order and findings and recommendations of the Magistrate Judge because she failed to adhere to the applicable standards for violations of the Automatic Stay.

The Automatic stay protects property of the estate in which debtor has legal, equitable or possessory interest.

The Automatic stay is a critical protection of bankruptcy law and quite broad in its scope.

As recognized by the Ninth Circuit, Section 362 the automatic stay is a critical protection of bankruptcy law and quite broad in its scope:

It is designed to effect an immediate freeze of the *status quo* by precluding and nullifying post-petition actions, judicial or non-judicial, in non-bankruptcy forum against the debtor or affecting the property of the estate. The automatic stay plays a vital and fundamental role in bankruptcy. The stay ensures that all claims against the debtor will be brought in a single forum, the bankruptcy court.

In Re: Ramirez 183 B.R. 583 (9th Cir. BAP 1995)

Exceptions to the Automatic Stay should be narrowly construed. In Re: Stringer 847 F.2d 549 C.A. 9 (Cal), (1988)

## CONCLUSION

The Honorable Kimberly J. Mueller appears to a sophisticated judge and her courtesy was much appreciated by this Pro Se litigant.

Plaintiff William J. Prater understands the difficulties involved in ruling for a Pro Se litigant against a large law firm located in the same city as the Court, but "equal justice for all" should be applied in this case.

There is absolutely no doubt and is undisputed that defendants filed or caused to be filed two different lawsuits

against William J. Prater, Prater Tree Farm in the Butte County Superior Court Oroville California during the pendency of the Bankruptcy Case in order to obtain property of the Bankruptcy Estate.

The defendant did not obtain a relief from stay as required by applicable Bankruptcy Law in order to file the two complaints.

A brief perusal of defendant's complaints filed in the Butte County Superior Court reveal that they are seeking over two million dollars in damages and fee title to a portion of the property that was contained in the Bankruptcy Estate.

Years ago the United States Supreme Court stated that the filing of a Bankruptcy Petition is a caveat to all the world, and everyone is bound by its terms. Mr. Ormiston was bound by the terms of 11 U.S.C. § 362 the Automatic Stay of the Bankruptcy Court, and even the service of a summons on William J. Prater was a violation of the Automatic Stay.

William J. Prater sent at least two letters to counsel for the defendant advising him to dismiss the State Court lawsuits and return matters to the *status quo*. Defendant and their counsel have refused.

The State Court Judge questioned counsel, why they did not just dismiss the lawsuits against William J. Prater, Prater Tree Farm.

The defendant's motion to dismiss is based entirely on the premises that all the property of the Bankruptcy Estate was abandoned back to William J. Prater before the closing of the Bankruptcy Case on June 11, 2002.

\\\

Defendants nor their counsel, or the Honorable Kimberly J. Mueller have not; cannot ever produce a document from Trustee Kenny W. Flinn the Trustee in the Bankruptcy Case where he abandoned the Property of the Bankruptcy Estate back to William J. Prater before the closing of the Bankruptcy Case.

William J. Prater, Trustee Kenny W. Flinn and everyone connected with the Bankruptcy Case knows that the Property of the Bankruptcy Estate was abandoned back to William J. Prater at the close of the Bankruptcy Case on June 11, 2002 because they signed a settlement agreement that they would do so, the property was subsequently abandoned pursuant to 11 U. S.C. § 554 (c) at the close of the Bankruptcy case.

WHEREFORE, Plaintiff William J. Prater, Prater Tree Farm respectfully requests that this Honorable Court not follow the order and findings and recommendations of the Honorable Kimberly J. Mueller. Plaintiff further requests that his request for judicial be granted in its entirety.

Plaintiff further requests that defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) be denied, and that the Court require defendant to file an answer in this case, or in the alternative grant Plaintiff leave to amend the complaint.

Dated: November 16, 2003

WILLIAM J. PRATER
dba PRATER TREE FARM
Plaintiff Pro Se

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Clipper Mills, California 95930
Telephone: (530) 675-2678

FILED
APR 9 2003

Defendant In Propria Persona

SUPERIOR COURT OFTHE STATE OF CALIFORNIA

COUNTY OF BUTTE

ORMISTON FAMILY ASSOCIATION, an unincorporated association,

Plaintiff

v.

BEAN ESTATES INCORPORATED, a California corporation; FLORENCE A. PRATER; RALPH PRATER; WILLIAM J. PRATER; PRATER TREE FARM, a business entity of unknown form; YOLANDA BEAN QUESADA; ELIZABETH B. PRATER; FREDERICK H. SCHILL; BARBARA L. ROBERTS; DREISBACH FAMILY TRUST; RONALD T. DREISBACH; MARIANNE L. DREISBACH; DREISBACH ENTERPRISES, a California Corporation; ALL PERSONS UNKNOWN, CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN PROPERTIES

Case No. 127412

**DECLARATION OF TRUSTEE - KEN FLINN RE: ABANDONMENT OF REAL PROPERTY OWNED BY WILLIAM J. PRATER**

**BK Case No. 95-27249-B**

DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFF'S TITLE, OR ANY CLOUD ON PLAINTIFF'S TITLE THERETO; and DOES 1 through 100, inclusive,

Defendant-Appellee.

I KEN FLINN hereby declare:

I served as the Trustee in the aforementioned bankruptcy estate. Since then, my duties as the Trustee have been relieved from me by court order. This Declaration has been prepared to reiterate that I did in fact abandon the real property involved in this estate back to William J. Prater, dba Prater Tree Farm at the close of the court proceedings in bankruptcy. The object of this abandonment was to state that I, as the Trustee for said estate, had no further interest in the real property and did not intend to further pursue any issues involving said property at the close of the bankruptcy proceedings.

WHEREFORE; the Trustee respectfully requests the court to accept this signed Declaration.

Kenny W. Flinn Dated: 2-10-03
Kenny W. Flinn, Trustee

WILLIAM J. PRATER
dba PRATER TREE FARM
Post Office Box 23
Clipper Mills, California 95930
Telephone: (530) 675-2678

Plaintiff Pro Se

FILED
DEC 2 2003

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

In re:

WILLIAM J. PRATER, dba PRATER TREE FARM

Plaintiff,

v.

DAVID C. ORMISTON JR.

Defendant.

Case No. CIV S-03 -1770 MCE KJM-PS

**DECLARATION OF TRUSTEE KEN W. FLINN RE: ABAND-ONMENT OF REAL PROPERTY OWNED BY WILLIAM J. PRATER**

**BANKRUPTCY Case No. 95-27249-A-7**

I KEN W. FLINN hereby declare:

I served as the Trustee in the aforementioned bankruptcy estate. Since then, my duties as the Trustee have been relieved from me by court order. This Declaration has been prepared to reiterate that I did in fact

abandon the real property involved in this estate back to William J. Prater, dba Prater Tree Farm at the close of the court proceedings in bankruptcy on June 11, 2002 and not before.

The object of this abandonment was to state that I, as the Trustee for said estate, had no further interest in the real property and did not intend to further pursue any issues involving said property at the close of the bankruptcy proceedings.

Any allegations that any real property, which was property of the estate was abandoned back to William J. Prater, dba Prater Tree Farm prior to the closing of the bankruptcy case are simply not true.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, and that this declaration was executed on 11-25-03 at El Dorado California.

WHEREFORE; the Trustee respectfully requests the court to accept this signed Declaration.

Kenny W. Flinn Dated: 11-25-03
Kenny W. Flinn, Trustee

Supreme Court, U.S
FILED
SEP 15 2005
OFFICE OF THE CLERK

No. 05-149

# In The Supreme Court of the United States

WILLIAM J. PRATER,

*Petitioner*,

v.

DAVID C. ORMISTON, JR.,

*Respondent*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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Respondent David C. Ormiston, Jr. (Ormiston) submits the following Brief in Opposition to Petition For A Writ of Certiorari:

## I.

## STATEMENT OF ISSUES

1. Did the District Court commit reversible error in granting Ormiston's Motion to Dismiss?
2. Whether the Complaint in the Butte County Action violated the automatic stay?
3. Whether the District Court committed reversible error by finding that the automatic stay was no longer in effect when the Butte County Action was filed because Prater had obtained his discharge?
4. Whether the Court committed reversible error by finding that the Clipper Mills property at issue was abandoned prior to the filing of the Butte County Action?

## II.

## STATEMENT OF CASE

Petitioner William J. Prater (Prater) filed a complaint for money damages for violation of the automatic stay of 11 U.S.C. §362(h) against Ormiston on August 26, 2003. Prater alleged that the complaint in Butte County Superior Court case number 127412, filed by the Ormiston Family Association, violated the automatic stay of Prater's bankruptcy action. On September 16, 2003, Ormiston filed a Motion to Dismiss Prater's action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Ormiston contended that the automatic stay was no longer in effect because Prater had obtained a discharge prior to the date the Butte County Action was filed. Additionally, Ormiston alleged that the automatic stay was no longer in effect because the property at issue was no longer property of the bankruptcy estate at the time the Butte County Action was filed. Thus, under either 11 U.S.C. §362(c)(1) or (c)(2), the automatic stay was no longer in effect.

The hearing on the motion to dismiss was held on October 29, 2003 before United States Magistrate Judge Kimberly J. Mueller. After oral argument, Judge Mueller issued an Order and Findings and Recommendations on Ormiston's motion to dismiss. In her order, Judge Mueller found that under 11 U.S.C. § 362(c)(2), the automatic stay continues until the earliest of one of three events (case closed, case dismissed, or discharged). In this case, it was undisputed that plaintiff was discharged on June 5, 2000 and thus the stay was no longer in effect after that date. The complaint in the Butte County Action was not filed until April 25, 2002 and therefore did not violate the automatic stay. Thus, the court held that Prater could not state a claim and dismissed this action. In addition, Judge Mueller found that the Clipper Mills property at issue was abandoned no later than May 2001 when the Bankruptcy Trustee filed his final report and the property was not listed as property of the bankruptcy estate. Since the Butte County Action was filed after the May 2001 date, there

also was no violation of the automatic stay because the property was no longer property of the estate.

On November 18, 2003, Prater filed an objection to the Magistrate Judge's findings and recommendations. Ormiston filed a reply to Prater's objection to Magistrate Judge's findings and recommendations on December 1, 2003. On December 16, 2003, the United States District Court Judge Morris C. England, Jr. adopted the Magistrate Judge's findings and recommendations in full and dismissed Prater's action. Prater then filed an appeal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the District Court's judgment without the need for oral argument. Prater then filed a Petition for Rehearing and Petition for Rehearing In Banc, which Petition was denied.

## III.

## STATEMENT OF FACTS

The Ormiston Family Association is the owner of approximately 40 acres of real property located in Clipper

Mills, California. Bean Estates Incorporated owns approximately 82 acres adjacent to the Ormiston property. Petitioner William J. Prater owns approximately 6 ½ acres of real property located south of and adjacent to the Ormiston property. The Dreisbach Family Trust owns approximately 160 acres north of and adjacent to the Ormiston property. The Ormiston Family Association owns an easement appurtenant to the Ormiston property which burdens the Bean Estates property and the Prater property, which easement extends from La Porte Road to the Ormiston property. The easement crosses the Bean Estates property and the Prater property prior to reaching the Ormiston property. The easement is located on a road called Grizzly Lodge Road and provides the only access to the Ormiston property from the main highway, La Porte Road.

On March 25, 2002, Prater caused an earthen berm approximately two feet in height to be constructed across the Ormiston easement near the connection of the Ormiston easement to La Porte Road. The berm completely precluded

access to the Ormiston property. After attempts to resolve the matter, Prater refused to remove the barrier. In addition, on or about April 10, 2002, Prater caused a large tree log approximately three feet in diameter to be placed across the Ormiston easement, near the location of the earthen berm. Said log acted as an initial barrier to the use and access to the Ormiston easement. Prater also refused to remove the tree log. Accordingly, on April 25, 2002, the Ormiston Family Association filed a complaint in the Butte County Superior Court (the "Butte County Action") for quiet title to its easement, interference with its easement, and intentional interference with economic advantage. The Ormiston Family Association named all of the above-described adjoining land owners in the Butte County Action. Contrary to Prater's assertion in his Petition for Writ of Certiorari, Ormiston did not file two complaints. Instead, the complaint in the Butte County Action was amended on May 28, 2002.

## IV.

## STANDARD OF REVIEW

Dismissal of an action for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. Review is limited to the contents of the complaint. *Fersher v. Shell Oil Company*, 846 F.2d. 45, 46 (9th Cir. 1988). A complaint may be dismissed with prejudice under Rule 12(b)(6) if it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

## V.

## SUMMARY OF ARGUMENT

Ormiston filed an action in Butte County Superior Court to quiet title to an easement across Prater's property and for damages caused by Prater's intentional interference with Ormiston's easement. Prater filed an action in the United States District Court for the Eastern District of California alleging a violation of Prater's automatic stay under 11 U.S.C. §362(h).